

EXHIBIT B

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6775VILH hearing
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

v.

05 Cr. 621 (KMK)

ALBERTO VILAR and GARY TANAKA,

Defendants.

-----x

July 7, 2006
10:30 a.m.

Before:

HON. KENNETH M. KARAS,

District Judge

APPEARANCES

MICHAEL J. GARCIA
United States Attorney for the
Southern District of New York
BY: MARC LITT
DEIRDRE McEVoy
Assistant United States Attorneys

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JESSICA MARGOLIS

and
KOBRE & KIM, L.L.P.
BY: STEVEN GARY KOBRE
JUSTIN SHER

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(Case called)

MR. LITT: Marc Litt and Deirdre McEvoy for the United
States. With us at counsel table are U.S. Postal Inspector
Cynthia Fraterriago and Jeff Jarrett.

THE COURT: Good morning.

MR. HOFFMAN: Good morning, your Honor. Jeffrey
Hoffman and Susan Wolfe. And with us is Joanna Eftychiou, who
is awaiting addition to the bar who is the only member of the

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16 information and testimony that comes out that bears on issues
17 that are close to that but really are beyond issues which is
18 part of what the letters address.

19 THE COURT: We will take that up next.

20 MR. HOFFMAN: So, I think if the examination does get
21 into areas of what Inspector Fraterrigo knew at the time, for
22 example, that the search warrant was applied for, or before,
23 what she knew all along, because that information assists the
24 Court in making an objective determination of what a reasonably
25 objective person in her situation with her knowledge would do,

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1 then of course that's information that she shared and
2 participated in with Mr. Litt and that would certainly cause an
3 overlap.

4 THE COURT: Okay.

5 Mr. Colton?

6 MR. COLTON: The overlap is even far greater than what
7 Mr. Hoffman points out.

8 Mr. Litt testified about all of the phone calls he
9 made during the course of the day of the search, many of which
10 were to Inspector Fraterrigo. He testified in fact that he had
11 a sudden new memory in, right before this hearing different
12 than his memory in February, different than his memory back in
13 May which was related to a phone call that some unknown postal
14 inspector that he couldn't remember -- and one would assume
15 that inspector from that time will be asked about phone calls
16 that went back and forth -- related to the issues of the search
17 and the grand jury subpoena.

18 Moreover, Mr. Litt testified about the arrest of
19 Mr. Tanaka. He testified about many, many subjects that
20 overlapped with Inspector Fraterrigo. And, frankly, the
21 government has him in his control. The government can put
22 Mr. Litt on to finish his testimony if they don't want him to
23 suggest that.

24 THE COURT: The easy answer is to have Mr. Litt go
25 first and finish up his cross.

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1 MS. MCEVOY: That's fine, your Honor.

2 THE COURT: I think that just solves the issue.

3 Let's take up the other issue. There is a couple
4 other issues.

5 One is with respect to, it starts off with a letter I
6 got on June 23rd from Mr. Colton and Ms. Margolis, and
7 Ms. Wolfe joins in on July 3rd, the government responded on
8 June 28, and then I got a letter yesterday at about a few
9 minutes before 4:00 and Mr. Colton responded.

10 The two issues are the scope of the cross-examination
11 of both Inspector Fraterrigo and Mr. Litt and the claim that's
12 initially made by Tanaka is that, and I'm quoting from the
13 second page: In answering this question as to good faith
14 reliance on the warrant, "it is appropriate for the Court to
15 look to 'the totality of the circumstances including any
16 information known to the officers executing the warrant but not
17 presented to the issuing Judge.'" That's from the Eighth
18 Circuit decision in U.S. v. Weeks.

19 Tanaka also cites the Eleventh Circuit's decision in
20 Marion; the Eighth Circuit's decision in Marion, the Southern
21 District of Indiana's decision in U.S. v. Uord, U-O-R-D.

22 Those are the main cases that are cited.

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23 There is also a whole back and forth about it. The
 24 qualified immunity doctrine is applicable here.
 25 As a result of these cases Tanaka argues that applying
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 1 the above standards to the instant case, it is clearly
 2 appropriate for the Court to hear testimony concerning fact
 3 known to the postal Inspectors at the time the search was
 4 executed, including but not limited to: (A), the full extent
 5 of the information provided by the two alleged "victims"
 6 Including any positive experiences with the defendants; (B),
 7 information provided by individual investors other than the two
 8 alleged victims noted in the affidavit; (C), information
 9 provided by institution of clients of Amerindo U.S.; and (D),
 10 information as to the full scope of U.S. Amerindo full various
 11 services offered by the company and the total amount of money
 12 under management.

13 MR. COLTON: Your Honor, as much as I hate to
 14 interrupt, I would ask that Inspector Fraterrigo step out while
 15 we discuss why we should ask certain questions of her.

16 MS. MCEVOY: That's fine, your Honor.

17 THE COURT: All right.

18 Then, nothing personal, Inspector.

19 After the government responds, but just so it is clear
 20 as to the position that Vilar takes, he joins the application
 21 and then suggests that the similar -- that the same cases also
 22 support the belief that, or the argument that there should be
 23 similar cross-examination of Mr. Litt, settling that in Leon
 24 one of the inquiries that a warrant was based on an affidavit
 25 so lacking in indicia of probable cause as to render official
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 1 belief in its existence entirely unreasonable.
 2 Vilar takes the position that the warrant was so
 3 lacking in probable cause that, first, no reasonable agent
 4 would believe that it was a valid warrant and that no federal
 5 prosecutor would believe that this was a valid warrant and that
 6 no magistrate, reasonable magistrate would believe that it was
 7 a valid warrant.

8 And so, based on this as put in the Count Four, the
 9 inquiry into the reasonableness of official belief and probable
 10 cause should therefore include that both that of both the
 11 prosecutor and the searching agents because, among other
 12 things, Inspector Fraterrigo was Mr. Litt's agent in conducting
 13 the search and she should be held to the same standard he would
 14 be.

15 The government, not surprisingly, opposes this,
 16 claiming that for purposes of this inquiry I need not go beyond
 17 the four corners of the affidavit and the warrant itself.

18 Then the government addresses another issue which is
 19 the Rule 26.2 issues.

20 The government notes it does not intend to elicit from
 21 Inspector Fraterrigo or any other witness details about the
 22 investigation including what she might have been told by any
 23 victims so, therefore, they don't intend to turn over the
 24 reports of the interviews of the victims or her testimony in
 25 grand jury, none of which related to the execution of a

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 1 warrant.

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2 It seems to me that that issue is joined by -- it gets
3 obviously wrapped up, Tanaka and Vilar, about the scope of the
4 cross-examinations because if defendants are right, then she's
5 going to be testifying about these things. If they're not
6 right, then she won't be.

7 Then there is the question of Inspector Fraterrigo's
8 e-mails.

9 The government says it located e-mails from Inspector
10 Fraterrigo, I presume, seeking the production by Detective
11 Sergeant Shaw of his "information" and other documents
12 presented to the U.K. Courts or to Cadogan Tate, and the
13 government says it is not appropriate to turn these over but if
14 I would like to review them in camera, that I should do that.

15 Let's start with that one first. I think I would like
16 to review them in camera. I think the defense has no
17 objection.

18 MR. COLTON: Yes.

19 MS. MCEVOY: Judge, just to clarify. Even though the
20 government's position was it didn't believe it was 3500
21 material the e-mails surrounding the shipment of materials to
22 Cadogan Tate, the government gave that over to the defense last
23 week.

24 THE COURT: All right.

25 MS. MCEVOY: But there is a small set of documents
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1 regarding after the litigation on this motion began Inspector
2 Fraterrigo reached out to Detective Sergeant Shaw to see if he
3 had copies of his application.

4 THE COURT: I was going to ask.

5 MS. MCEVOY: I wanted to clarify, because there are
6 two categories of information.

7 THE COURT: The latter category of information, the
8 timing of those e-mails is after the --

9 MS. MCEVOY: January 2006.

10 THE COURT: I will look at them.

11 Look. I have read the cases that everybody cites. I
12 have read a bunch of other cases but -- Mr. Colton, is there
13 anything else you want to add to this point?

14 MR. COLTON: Just one more issue your Honor didn't
15 mention that has to be decided.

16 THE COURT: Sure.

17 MR. COLTON: That's the question of whether Brady and
18 Giglio apply in the suppression hearing context.

19 The government is obligated to turn over and start
20 with Giglio, most importantly Giglio material on the witnesses
21 that is proffered into this Court. And that is just another
22 issue.

23 THE COURT: Well, it is an issue only if the stuff
24 that the government says it has would be relevant to her
25 testimony. I mean, I'm not sure that that issue needs to be

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1 taken up.

2 For example, what is the scenario in which you don't
3 get this material under 26.2 but you do get it as Giglio?

4 MR. COLTON: I'm not besmirching the Inspector.

5 THE COURT: I'm not suggesting you are.

6 MR. COLTON: But if she had been previously found by
7 another Court to have filed false statement, that's clearly
8 impeachment material. I'm not saying that happened.

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9 THE COURT: That's not the context in which this is
 10 raised by the government.
 11 MS. MCEVOY: No. Even though -- and the government
 12 has turned over -- there was none. But if the government had
 13 that information the government would obviously have turned it
 14 over irrespective whether Giglio or Brady applies to this
 15 hearing.
 16 MR. COLTON: I'm confused then as to the government's
 17 position that they don't have to turn over Giglio material. If
 18 their representation is they don't have any, I will accept the
 19 representation for now.
 20 THE COURT: Ms. McEvoy?
 21 MS. MCEVOY: The government's position was that the
 22 small set of e-mail was not 3500 material.
 23 THE COURT: And also, even if it were Giglio, it
 24 doesn't get turned over.
 25 MS. MCEVOY: Exactly.
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1 THE COURT: That's the context in which I understood
 2 it.
 3 Let me ask Mr. Colton's question. It sounds like you
 4 have answered it, but I take it if there is anything else about
 5 Inspector Fraterriago's professional history where, for example,
 6 some judge found that she perjured herself or anything like
 7 that -- again, no one is suggesting that that's true -- but,
 8 taking the most extreme hypothetical to make Mr. Colton's point
 9 of forum, that you would have turned that over?
 10 MS. MCEVOY: That is correct, your Honor.
 11 THE COURT: Okay.
 12 Does that cover that, Mr. Colton?
 13 MR. COLTON: Yes. We have no other way to know but it
 14 wasn't clear and I wanted the record to be clear.
 15 THE COURT: Now, with respect to the scope of the
 16 cross.
 17 MR. COLTON: Your Honor, this is most certainly not an
 18 attempt to back door a Franks hearing. We are not, at this
 19 point, reopening that question. Your Honor said we could. We
 20 may, depending on what happens, but we are not doing that now.
 21 What we are suggesting is the case law -- and frankly
 22 the Leon case itself supports the proposition that we are
 23 entitled to look at the totality of circumstances to address
 24 the question of what would an objectively reasonable officer or
 25 agent do under the same circumstances and, frankly, Leon says
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1 exactly that. The question, at page 920 of the opinion is the
 2 officer acting as a reasonable officer would and should act in
 3 similar circumstances.
 4 So, without knowing the information available to the
 5 executing agents, how do we know what the similar circumstances
 6 are?
 7 And, frankly, to use an absurd example, your Honor,
 8 just to highlight the point, if this was a homicide case and
 9 the agent had sworn to an affidavit that said, "I interviewed a
 10 witness who saw the defendant point a gun at the victim, fire
 11 it, and the victim fall," surely that would make probable cause
 12 for an arrest or search of premises -- but we find out later
 13 that the witness also said, "while the victim was pointing a
 14 weapon back at the defendant."
 15 Now, a reasonable officer, knowing that second fact,

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16 wouldn't really think the probable cause analysis was the same.
17 THE COURT: No, because in that situation that would
18 be a Franks problem.

19 I mean, that hypothetical gets you a Franks hearing,
20 it does not get you --

21 MR. COLTON: It is an extreme example.

22 THE COURT: But it is so extreme that it takes it
23 outside of Leon and moves it towards Franks.

24 MR. COLTON: If you look at the Eighth Circuit's
25 rationale, the Eleventh Circuit's rationale and, frankly, the
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1 similar circumstances specific language of Leon, there is no
2 reason to restrict the inquiry to just what the agent put in
3 the four corners of the affidavit.

4 It is important to know what else was known to the
5 agent. We are not going or are asking your Honor to allow us
6 to ask any agent their subjective opinion, their subjective
7 simply what did you know, what were you told.

8 For example, in this case you have Inspector
9 Fraterrigo saying that there is over a billion dollars under
10 management and yet there is \$17 million alleged in loss. So,
11 for her then to say if she really knew there was a billion
12 dollars under management, to say that of that 1 percent or
13 something of the entire company has probable cause, I can take
14 documents of the entire company, we want to know that.

15 THE COURT: Is Leon -- Leon, of course, does not
16 explicitly support your claim. You are more relying on the
17 Eleventh Circuit cases. Leon says that there are four
18 circumstances where good faith does not apply. First is that
19 the magistrate judge who issued the warrant was misled.

20 MR. COLTON: Right.

21 THE COURT: Second is that the issuing magistrate only
22 abandoned his or her traditional role; the third is that the
23 affidavit in support of the warrant is so lacking in indicia of
24 probable cause as to render official belief in its existence
25 entirely unreasonable; and fourth is that the warrant is so

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1 facially deficient that the executing officers cannot
2 reasonably presume it to be valid.

3 Right? Those are the four areas where good faith
4 doesn't apply?

5 MR. COLTON: Correct.

6 THE COURT: I take it that no one is suggesting the
7 second prong is in play here, that the magistrate judge
8 abandoned his role as a neutral arbiter. No one is suggesting
9 that, right?

10 MR. COLTON: We are not making that argument to try to
11 support the evidence.

12 THE COURT: Right.

13 MS. WOLFE: I think I did very explicitly suggest it
14 in my letter.

15 THE COURT: I almost fell out of my chair, frankly,
16 and that's why I asked the question.

17 MR. COLTON: We are not.

18 THE COURT: I know, I know, I know. Believe me, there
19 is a purpose to all these questions, Mr. Colton.

20 MR. COLTON: I have no doubt.

21 THE COURT: I am stunned at that. I am absolutely
22 stunned that you would say that about a magistrate judge in

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23 this court house. I mean, you know what the facts are? You
24 know what you have to allege to say that about a magistrate
25 judge, that they ignore their sworn duty?

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1 That's stunning to me. We will get back to that,

2 Ms. Wolfe.

3 MS. WOLFE: I really would like to address it.

4 THE COURT: You can address it later on.

5 with respect to these cases, is it your suggestion,
6 Mr. Colton, that these cases stand for the proposition that in
7 every circumstance a Court is to go beyond the four corners and
8 to look at what the agent knew, that maybe he or she didn't
9 tell the magistrate?

10 Is that the suggestion?

11 MR. COLTON: First of all, that only arises when the
12 question of good faith is at issue; if you have a warrant that
13 is not a general search, not so grossly overbroad from what is
14 in the affidavit.

15 THE COURT: Of course, talking about Leon.

16 MR. COLTON: We have to get past that to get to Leon.

17 THE COURT: Is it your view that every time the good
18 faith belief in the validity of the warrant is in play that the
19 court is to go beyond the four corners of the affidavit in the
20 warrant and go into, for example, what the agent knew, the
21 entirety of what the agent knew, either the agent who was the
22 case agent or the executing agent or anybody who was involved
23 in the search?

24 Is that what your view is that Martin and the other
25 cases say?

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1 MR. COLTON: Yes.

2 THE COURT: The Eleventh Circuit, after Martin, in a
3 case called U.S. v. Robinson, 336 F.3d 1293, said the following
4 at page 1297: The question posed in Martin was "whether the
5 Court, in deciding whether the execution of the search warrant
6 was reasonable may consider information known to the officer
7 that it was not presented in the initial search warrant
8 application or affidavit. Martin held that the Court can look
9 beyond the four corners of the affidavit to answer that
10 question. Martin did not hold, however, that the Court must
11 consider beyond the evidence of the four corners of the
12 affidavit in order to find good faith reliance."

13 "Although we have indicated the government bears the
14 burden of demonstrating the applicability of Leon good faith
15 exception, we discern no reason why that burden cannot be met
16 by reference to facts stated within the affidavit that the
17 government did not present extrinsic evidence of Detective
18 Cook's good faith in this case does not, itself, vitiate
19 finding of good faith relies on the warrant."

20 So, that's not what the Eleventh Circuit's view is.

21 MR. COLTON: Two points.

22 THE COURT: Please.

23 MR. COLTON: First, we don't suggest that the
24 government's failure to put in extrinsic evidence would
25 vitiate. So, there is two points your Honor made from the

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1 case, that point is not, I believe, relevant.

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2 THE COURT: It said, "the Court need not consider,"
3 which is opposite of what you told me Martin said.

4 MR. COLTON: I'm saying Martin says -- if I was
5 unclear, I'm sorry.

6 Martin says and the other cases say the Court may.
7 And in this case I'm not saying your Honor must, but I'm saying
8 your Honor should exercise his discretion to do so because you
9 have a case here where the government, very strenuously, fought
10 against putting Inspector Fraterrigo on the stand, against
11 putting other witnesses on the stand, only to turn around 180
12 degrees and say this witness is critical, this witness is
13 necessary. These other witnesses are necessary.

14 And I venture to say that this witness who was
15 previously dubbed by the government to be a fishing expedition
16 would be on the stand under the government's admonition for
17 hours. And that raises some question in and of itself.

18 Moreover, when you look at what is in the affidavit
19 allegation about two clients in a huge operation, allegations
20 that go from 2003 to 2005 but yet a warrant that covers 20
21 years, there are facts that scream out to say, your Honor,
22 before you can actually say there was good faith in executing
23 such a blatantly overbroad and blatantly unsupported warrant
24 that we should find out what the executors knew.

25 THE COURT: The record will speak for itself under
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1 colloquy on what the Eleventh Circuit held, but I think the
2 important point is that the Eleventh and Eighth Circuit, they
3 don't describe it in terms of the Court's discretion. There is
4 no such language in any of those opinions or frankly those that
5 apply to those opinions, because that is what I looked at.
6 what they talk about is what the government itself is allowed
7 to put forth in a suppression hearing to substantiate the good
8 faith belief of the agent.

9 I mean, one interesting case on this is Marion. And
10 what happened there is that it was the third Leon exception
11 that was in play there, that is, that the warrant was so
12 lacking in indicia of probable cause as to render official
13 belief in its existence entirely unreasonable, and there the
14 defendant argued that the executing officer's reliance on the
15 issuing Judge's determination of probable cause was entirely
16 unreasonable because the affidavit contains so few indicia of
17 probable cause to believe criminal activity was occurring in
18 the motel room, or that evidence of criminal activity would be
19 found there.

20 And what the Eighth Circuit said was we disagree.
21 First they think that the affidavit was sufficient but then he
22 went on to say that when assessing the objective reasonableness
23 of police officers executing a warrant, in looking at the
24 totality of the circumstances they said it was appropriate for
25 the government to proffer and for the Court to consider

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1 information known to the officers but not presented to the
2 issuing judge.

3 Now, the logic frankly escapes me on that but because
4 what it allows is it allows the government to argue that even
5 if the affidavit didn't substantiate a finding of probable
6 cause, if the applying law enforcement officer knew of
7 additional incriminating information that he or she didn't
8 share with the magistrate, that it would be objectively

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9 reasonable for that person to go ahead and search the premises.
10 As I said, that's an elliptical analysis because, if
11 you ask me, it allows an agent to say, oh, I am allowed to do
12 it, the piece of paper itself was justified by a piece of paper
13 that didn't contain enough PC but since I didn't tell the
14 judge, it is okay by me, whatever.

15 But, the point is all of these cases come up in that
16 context where it is okay for the government to offer what it is
17 that the agent knew beyond what was in the four corners of the
18 affidavit that would substantiate that agent's belief that he
19 or she was properly searching the premises, not that it is
20 error for the Court not to consider all the other things
21 swimming around in the agent's head that wasn't told to the
22 magistrate and there is nothing to suggest otherwise in these
23 cases.

24 MR. COLTON: It cannot be that the standard is a
25 double standard, that if we are in a Leon analysis and the
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1 government needs to put in more information it can but the
2 defense cannot. That can't be the law.

3 THE COURT: What is surprising to me is that -- let me
4 put it to you this way. If the situation were that the
5 affidavit here, the government conceded that the affidavit did
6 not even substantiate PC to search the place at all, let alone
7 the scope of the warrant that we are talking about here and the
8 government came to me and cited me Marion; I would say, thank
9 you very much, it is the Eighth Circuit, I'm not bound by it,
10 don't buy it. Have a nice day.

11 And I think you and I agree and it is surprising to me
12 that you think these cases are good because I think they are
13 suggesting that the government is allowed to proffer and the
14 Court may consider -- may consider this information because it
15 would go to, frankly, the subjective belief of the executing
16 agent because it would go to what he or she knew beyond that
17 which was told to the magistrate.

18 There is nothing from these cases and they all come up
19 in this context of whether or not the agent knew something that
20 he or she wasn't telling the judge that was incriminating and
21 therefore it was okay for them to search the premises. That's
22 all they say. And I think that the Robinson case makes clear
23 that they were sort of putting the brakes on anybody thinking
24 that this requires a court to look beyond the four corners.

25 MR. COLTON: The Eleventh Circuit says "may." We are
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1 talking the position "may" but the Eighth Circuit definitively
2 says must.

3 THE COURT: Okay. Be careful. Be careful about that
4 but go ahead.

5 MR. COLTON: Well, I mean, the quote from Marion on
6 the last page says: When assessing the objective
7 reasonableness of police officers executing a warrant, we must
8 look to the totality of circumstances including any information
9 known to the officers but not presented to the issuing judge.

10 THE COURT: Right, so that you must look at the
11 totality of the circumstances.

12 MR. COLTON: Right. And.

13 THE COURT: And when the government says that the
14 executing officer didn't tell the judge, then you must look at
15 that. That's not to say that you need to look at everything

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16 that was inside the agent's head regardless of which prong of
17 the four that we are looking at in Leon. You always have to
18 look at it beyond what is regardless of the circumstance. It
19 is not what they're saying. In fact, the Court within the
20 Eighth Circuit have interpreted it as may.

21 United States v. Summage, an April 5, '06 case, it
22 says: In some circumstances, an executing officer's knowledge
23 that is not contained in the affidavit may still provide a
24 basis for the good faith exception.

25 And that's exactly right. I mean, that is a proper
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1 interpretation of Marion.

2 And Mr. Colton, I think you and I agree that the
3 notion that what is -- if Inspector flat out knows something
4 that is incriminating and she didn't tell the magistrate judge,
5 I guess being neutral here, so what?

6 Looking at this from an objective viewpoint, what
7 about all the other agents who executed the warrant who didn't
8 know what Fraterrigo knew. And if they look at this thing and
9 say or a reasonable inspector in their position would look at
10 that affidavit and say, there is no way there is PC here. You
11 win. I could care less also what is in Fraterrigo's head if it
12 is incriminating.

13 But, those cases don't say in every circumstance I am
14 required to go beyond the four corners of the affidavit, and I
15 don't think they talk about in terms of the Court's discretion.
16 They're talking about in specific context that is not at issue
17 here

18 MR. COLTON: Again, the distinction that the
19 government can save a search with extrinsic evidence outside of
20 the warrant but the defense can't try to neutralize good faith
21 by that very same set of information is a problematic double
22 standard to the defense.

23 THE COURT: You don't have any authority from the 8th
24 or 11th circuits that takes that view. And also, there isn't
25 any. There is none. That's the point of Robinson.

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1 Robinson rejects a defendant's argument that Martin
2 should be read as requiring a Court to go beyond. They say,
3 no, that's not at all what we are saying. And in the context
4 of which Martin is decided, like Marion and the context in
5 which Robinson is decided, that's point they're making.

6 And in any event, there is -- there is no authority
7 that is making the proposition you are making, either in the
8 11th, 8th or any other circuit.

9 MR. COLTON: You are right, your Honor, we are arguing
10 fundamental fairness that says that the standard for both sides
11 should be the same. And the government in this case continues
12 to take the position that the standards are not the same for
13 both sides.

14 THE COURT: No, they're not. The government is saying
15 that your cases are distinguishable. The government actually
16 relied on cases within the circuit that suggest that it is --
17 look, you can look at the totality of the circumstances.

18 For example, Judge Mukasey in Burke looked at what was
19 taken. But, in terms of evaluating the objective good faith
20 belief of the Inspectors carrying out or law enforcement
21 officers carrying out the search, there is nothing in Burke
22 that says you have to go inside their heads and figure out what

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23 else they knew that they didn't tell anybody.
24 Nothing in Burke that says that. And no other case
25 within the Second Circuit.

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1 what I'm saying to you is the analysis in Marion, to
2 me, is unpersuasive. I wouldn't allow the government to do
3 this. And maybe it is in part because it is an asymmetric
4 benefit to the government but also it just doesn't flow from
5 Leon. It doesn't flow. It doesn't matter if the inspector has
6 other incriminating evidence in her head that she didn't tell
7 the magistrate judge. It doesn't matter, especially to the
8 other inspectors.

9 So, I don't think that these cases, they certainly
10 don't say that I'm required to go beyond the four corners of
11 the affidavit. To the extent they allowed it in circumstances
12 there are certain circumstances that are different. Even if
13 they are buying, which they're not and persuasive, they're
14 different.

15 And so, I just don't see that they remotely support
16 the extensive cross that you want to do.

17 MR. HOFFMAN: Your Honor, before we leave that point
18 may I make a comment on it?

19 THE COURT: Of course.

20 MR. HOFFMAN: And we may be talking about something
21 different but let me suggest the following:

22 In the first prong under Leon where it says
23 suppression is warranted, may be warranted, is where the
24 issuing magistrate judge was misled by information in an
25 affidavit.

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1 THE COURT: Yes.

2 MR. HOFFMAN: If there is information in the affidavit
3 that would be misleading, if the Court knew of information that
4 the agent --

5 THE COURT: A material omission --

6 MR. HOFFMAN: -- had --

7 THE COURT: -- yes.

8 MR. HOFFMAN: -- that we should be allowed to explore,
9 I take it?

10 THE COURT: That's Franks. That's Franks. And
11 Mr. Colton made clear that he wasn't trying to reopen the
12 Franks issue.

13 That's Franks. That's misleading the magistrate judge
14 and I have already ruled that the defense hasn't given me any
15 basis to believe that the magistrate judge in this case was
16 misled by a misrepresentation or material omission and so I'm
17 not going to allow Franks.

18 MR. HOFFMAN: Let me suggest the following.

19 THE COURT: Sure.

20 MR. HOFFMAN: I understand you say it is Franks, but
21 let me suggest the following.

22 In the affidavit one of the -- and I don't have it in
23 front of me but I can pull it out if you want to read specific
24 words, one of the statements made to the magistrate judge is
25 that historically Amerindo was an advisor to institutional

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1 clients.

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2 A. That's correct.
3 Q. Did you ever tell the people who you briefed on what they
4 were allowed to seize that they were not allowed to seize any
5 of the various documents I just went over with you as it
6 related to clients of institutional clients of Amerindo
7 Investment Advisors, Inc., the American licensed company?
8 A. No, I did not.
9 Q. Would it be accurate to say that any of the other
10 paragraphs in attachment A that refer to generic-type documents
11 as I just read to you, broadly described documents that were
12 between Amerindo Investment Advisors, Inc., the licensed
13 American registered investment advisory company, and its 20
14 years' worth of institutional clients, you had no probable
15 cause for the seizure of those documents?

16 MS. MCEVOY: Your Honor, objection. Just ambiguous
17 question.

18 MR. HOFFMAN: I can go through it.

19 THE COURT: Go ahead, Mr. Hoffman.

20 MR. HOFFMAN: Okay.

21 Q. Sticking with paragraph 4 you also asked for other
22 documents -- if you look at paragraph 4, after you asked for
23 the documents we just discussed concerning those that were sent
24 to or received from client, you then go on and say: And other
25 documents concerning or reflecting the identities of and

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1 communications with clients who have investments in the
2 Amerindo brokerage account.

3 Do you see that?

4 A. Yes.

5 Q. Would it be accurate to say that there was no probable
6 cause to seize documents of any of the institutional clients of
7 the licensed investment advisor Amerindo Investment Advisors,
8 Inc., U.S., that had investments in Amerindo brokerage
9 accounts, is that correct?

10 A. Yes, that's correct.

11 Q. And it would be equally correct to say that you never told
12 that to any of the agents who executed the search warrant that
13 those documents, there was no probable cause for and they
14 shouldn't take them, correct?

15 A. That's correct.

16 Q. Would it be equally correct that nowhere in your
17 submission, in your sworn affidavit, do you state that there
18 are 20 years' worth, give or take, of institutional clients of
19 Amerindo Investment Advisors, the licensed U.S. company, whose
20 documents should not be taken?

21 A. I didn't put that in my affidavit.

22 Q. And, in fact, nowhere in your affidavit do you even say
23 that there are such clients?

24 MS. MCEVOY: Your Honor, objection for -- based on
25 your earlier rulings of what is not in the affidavit.

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1 THE COURT: Overruled, because that has to do with
2 something different. You are talking about a relationship
3 between what has been sought or not sought and that's what we
4 are going through --

5 MR. HOFFMAN: Correct.

6 THE COURT: -- and why? Overruled. Go ahead.

7 THE WITNESS: Can you repeat it? I'm sorry.

8 BY MR. HOFFMAN::

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9 Q. And, in fact, you never even state in your affidavit and
10 the attachment thereto that there are such institutional
11 clients as Amerindo U.S., the licensed Amerindo investment
12 advisory company that they exist, these institutional clients?

13 You never state that in the affidavit, is that
14 correct?

15 A. That's correct.

16 Q. Looking at paragraph 5 you ask for client lists, client
17 files, investment brochures, marketing materials, investment
18 advisory agreements, copies of correspondence sent to or
19 received from clients and other documents concerning or
20 reflecting the identities of an communications with clients who
21 have investments managed by Amerindo who receive redemptions
22 through or make investments through overseas bank accounts and
23 trust companies including PTC Management, Limited, and
24 Barclays.

25 Do you see that?

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1 A. Yes.

2 Q. Did you have any probable cause to ask for client lists
3 that would include, for example, any of the institutional
4 clients of Amerindo U.S., the licensed investment advisors
5 company, whose monies were so invested?

6 A. No.

7 Q. And that would be the same under that paragraph, you would
8 have no probable cause to those clients to their client files,
9 investment brochures, marketing materials, etc., correct?

10 A. That's correct.

11 Q. Now, in paragraph 6 you ask for documents reflecting all
12 investments in which Brian Harvey was involved, correct?

13 A. That's correct.

14 Q. And, again, you swear and state that you have probable
15 cause to seize all documents reflecting Brian Harvey's
16 investments, correct?

17 A. That's correct.

18 Q. And, what was the probable cause that you had, that you
19 swore you had concerning Brian Harvey?

20 A. I had information to believe that this individual did
21 not -- attempted to redeem an investment, had trouble with his
22 investment.

23 Q. Was that information you got from Brian Harvey?

24 A. No, it was not.

25 Q. Was that a document?

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1 MS. MCEVOY: Objection.

2 THE COURT: Sustained.

3 Mr. Hoffman, if it is in the affidavit it is in the
4 affidavit, fine, if she wants to point to something in the
5 affidavit. What's behind it, we're not going there.

6 MR. HOFFMAN: Thank you.

7 Q. Show me what in this affidavit supports probable cause that
8 you swore you had that Brian Harvey documents reflecting
9 investments should be seized; what probable cause you had --
10 I'm sorry -- what probable cause there was in these documents
11 that show that there was evidence of criminality concerning
12 Brian Harvey, on the premises at Park Avenue?

13 A. Paragraph E of the affidavit.

14 THE COURT: Which paragraph? I'm sorry.

15 THE WITNESS: E.

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16 THE COURT: E.
17 MR. HOFFMAN: Can I have one moment?
18 THE COURT: Sure.
19 BY MR. HOFFMAN::
20 Q. Are you talking about page 9?
21 A. I'm sorry. Page 5 of the affidavit, paragraph E.
22 Q. Okay, there are two paragraph Es. They're on different
23 numbers. There is one on page 9. But, on paragraph E you are
24 talking about page 5 where you state: Cates told me about
25 other individuals who she believed to be investors with
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1 Amerindo. Let's stop there.
2 That is correct?
3 A. That's correct.
4 Q. So, that statement is that you were told by Cates that she
5 believed as opposed to knew, is that what you are saying?
6 MS. MCEVOY: Objection.
7 THE COURT: It speaks for itself.
8 MR. HOFFMAN: Okay.
9 Q. When you wrote down that you were told that she believed
10 was it your understanding, since it is your words, that that
11 meant she wasn't sure?
12 MS. MCEVOY: Objection.
13 A. She believed.
14 THE COURT: Sustained. Sustained. It speaks for
15 itself.
16 BY MR. HOFFMAN:
17 Q. She believed to be invested with Amerindo, some of whom may
18 have had trouble redeeming all or part of their investment
19 including Brian Harvey.
20 A. That's correct.
21 Q. So, what you swore was your probable cause was a statement
22 that Brian Harvey may have been or was believed to potentially
23 have been an investor and may have had trouble redeeming all of
24 his shares.
25 Is that what are you telling us was your sworn
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1 statement that that was probable cause?
2 A. It's in my affidavit was probable cause, yes.
3 Q. And there is nothing else in any of these submitted papers
4 for this warrant concerning Brian Harvey, correct?
5 A. That's correct.
6 MR. HOFFMAN: If I can have another second, your
7 Honor?
8 THE COURT: Sure.
9 (Pause)
10 Q. Going back to Exhibit A, paragraph 6 --
11 THE COURT: Attachment A.
12 Q. -- sorry -- where you say documents reflecting all
13 investments naming certain people including Brian Harvey; you
14 then say Joy Urich.
15 Do you see that?
16 A. Yes.
17 Q. So, you are aware that you have probable cause to seize
18 documents reflecting investments of Joy Urich. Is that right?
19
20 A. Yes.
21 Q. And your understanding, again, was that you have probable
22 cause to believe that there are documents that are at the Park .